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In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. 133—Miscellaneous

EARL R. DEEN,

Petitioner,

v.

HONORABLE J. E. HICKMAN, Chief Justice and HONORABLE W. ST. JOHN GARWOOD, *et al.*, Associate Justices of The Supreme Court of Texas,

Respondents.

REPLY OF PETITIONER TO RESPONDENT'S REPLY

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August 27, 1958

INDEX

Subject Index

	Page
I. Introduction	1
II. Jurisdiction	2
III. Has The Supreme Court of Texas Violated the Mandate of the Supreme Court of the United States?	7
IV. Further Comments on Respondent's Reply	13
V. Prayer	20
VI. Certificate of Service	21

	Page
Brady v. Southern R. Co. (1942), 320 U. S. 476, 64 S. Ct. 232	13, 19
Chicago M. & St. P. Ry. Co. v. Coogan (1926), 271 U. S. 472, 46 S. Ct. 564	13, 19
Ex Parte Dubuque & Pac. R. Co., 1 Wall. 69	12
Ex Parte Texas, 315 U. S. 8, 86 L. Ed. 579, 62 S. Ct. 418	4, 16
Gaines v. Caldwell, 148 U. S. 228, 13 S. Ct. 611, 617	6
Harsh v. Illinois Terminal R.R. Co., 348 U. S. 940, 75 S. Ct. 362, 99 L. Ed. 736	11, 13
Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740	11, 13
Metropolitan R.R. Co. v. Moore, 121 U. S. 558, 30 L. Ed. 1022, 7 S. Ct. 1334	15
Norvell Service Company v. Spell, et al., 288 S. W. 2d 133, 144	17
Port Terminal Railroad Association v. Ross (1956), 289 S. W. 2d 220, 226	13, 19
Rogers v. Missouri Pacific Railroad Co., 352 U. S. 500, 77 S. Ct. 443	10

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To The Honorable the Chief Justice and The Associate Justices of The Supreme Court of The United States:

I. INTRODUCTION

In spite of the forty-six pages of respondent's confused presentation, its misrepresentation of petitioner's positions, its gossip "Without going completely outside the record, we cannot tell the Court why Deen," etc. and its citation of some eighty-eight authorities, most of which have nothing to do with the issues before the Court, it is still true there

are only two simple, direct and clear-cut issues before this Court:

1. Does this Court have jurisdiction to issue a writ of mandamus in this case to The Supreme Court of Texas?

2. Has The Supreme Court of Texas violated the mandate of the Supreme Court of the United States;

II. JURISDICTION

In his Motion for Leave to File Petition for Writ of Mandamus and the accompanying petition, petitioner has referred to the Act of Congress that authorizes the writ and has cited authorities in support thereof. In Respondent's Reply (p. 4) the respondent does not question in general the jurisdiction of this Honorable Court to issue the writ to the highest state court but does question the jurisdiction in the *Deen* case, because

1. no final judgment has been entered;

2. Deen's petition presents no substantial federal question;

3. Deen's petition should be directed to the Court of Civil Appeals of Texas rather than The Supreme Court of Texas; (Reply, p. 16)

4. Mandamus will not lie because Deen either now has or at some future time will have an appropriate and adequate remedy by writ of certiorari. (Reply, p. 4.)

1. With respect to the finality of the judgment of The Supreme Court of Texas, Deen says the Supreme Court of the United States has finally decided that Deen's proofs justified with reason the jury's conclusion that employer

negligence played a part in producing his injury. Petitioner does not care how The Supreme Court of Texas or respondent characterizes the above holding, as a holding of "enough evidence," "some evidence," "more than no evidence," "more than a scintilla of evidence" or whatever terminology they may use, the conclusion is inescapable the Supreme Court of the United States has appraised Deen's evidence as meeting the test for a jury case under FELA. That holding establishes the law of the case and The Supreme Court of Texas, under the guise of local practice, cannot evade the mandate of the Supreme Court of the United States nor prescribe a different test for judicial appraisal of the sufficiency of Deen's evidence to make a jury case.

Under the mandate of the Supreme Court of the United States, The Supreme Court of Texas cannot tamper nor meddle in any way with the evidence question and cannot direct the Court of Civil Appeals to tamper nor meddle with that question. Many other questions were left open for the decision of the state courts, questons relating to the sufficiency of the pleadings, the Court's charge, the excessiveness of the verdict, etc. All those questions have been now finally decided by The Supreme Court of Texas. Since all questions relating to the judicial appraisal of the evidence to meet the test under FELA for a jury case have been finally decided by the Supreme Court of the United States and since thereafter The Supreme Court of Texas has finally decided all other questions left open by the mandate of the Supreme Court of the United States, The

Supreme Court of Texas rendered a final judgment in this cause, whether it knew it or not, and the only question left open for the review of this Honorable Court is whether Deen has been deprived of the right of trial by jury a second time by taking away from him a part of the damages awarded him by the jury on substantial evidence.

But irrespective of the finality of the judgment of The Supreme Court of Texas, Deen is entitled to a writ of mandamus to compel obedience to the mandate of this Court unless at this time he can obtain the same relief by writ of certiorari. Mandamus will lie when a state court has reached the point that no further proceedings may be had without violating the mandate of the Supreme Court of the United States irrespective of whether a final judgment has been rendered. In *Ex Parte Texas*, *315 U. S. 8, 86 L. Ed. 579, 62 S. Ct. 418*, this court clearly recognized its jurisdiction to issue a writ of mandamus to The Supreme Court of Texas in a case where no final judgment had been rendered.

2. Respondent's second point on jurisdiction is that Deen's petition for mandamus will not lie because no substantial federal question is involved. Petitioner cannot agree with respondent that the construction of the mandate of the highest court in the land does not present a substantial federal question. In *Ex Parte Texas*, supra, this Honorable Court, speaking through Mr. Justice Frankfurter, refers to the proper construction of the mandate of this Court as "an indubitably federal question."

3. Respondent's third point on jurisdiction is that, if Deen is entitled to mandamus at all, it should be directed to the Court of Civil Appeals of Texas rather than to The Supreme Court of Texas. But why should the writ be directed to the Court of Civil Appeals of Texas, who has faithfully executed the mandate of the Supreme Court of the United States, rather than to The Supreme Court of Texas who has disobeyed that mandate and has directed the Court of Civil Appeals to violate it by inquiring into a question finally decided by the Supreme Court of the United States? Why should Deen be put to the vexation and expense of participating in further proceedings in various Texas courts in violation of the mandate of this Honorable Court on a question that has already been finally decided in his favor by this Court?

4. Respondent's final point on jurisdiction is that a writ of mandamus will not lie if Deen now has or will hereafter have some other adequate remedy. There is no issue between the parties that a writ of mandamus is a drastic remedy and will not lie if there is other adequate remedy. Petitioner's position on this point is made clear by his seeking a writ of mandamus in the alternative and only in the event the Court should decide that a writ of certiorari will not lie. If at the present time, a writ of certiorari will lie, Deen is not entitled to have issued a writ of mandamus. Deen does not agree with respondent that a writ of mandamus will not lie if at any time in the future Deen will have his remedy by writ of certiorari. The alternate remedy must be adequate. Respondent says even if The

Texas Supreme Court has directed the parties to litigate further contrary to the mandate of the Supreme Court of the United States and to litigate further a question that has already been decided in Deen's favor by the Supreme Court of the United States, which contentions respondent concedes only for the sake of argument, nevertheless, Deen will have an adequate remedy by certiorari at some distant time in the future when a final judgment is rendered, and therefore a writ of mandamus will not lie at this time. But the hope of a remedy is not an adequate remedy. What assurance does Deen have that an appellate court that reverses and remands his cause of action in violation of the mandate of this court and refuses to comply with the mandate of this court by issuing execution for costs, would ever render a judgment final in form in his cause? If the jurisdiction of the Supreme Court of the United States to enforce its mandate by mandamus depends on The Supreme Court of Texas' rendering a judgment final in form after remand, then the mandate can never be enforced unless The Supreme Court of Texas permits its enforcement. Nor does petitioner concede that even if he might be entitled to a writ of certiorari after the vexation and expense of four or five more years of litigation, that this is an adequate remedy which prevents the issuance of a writ of mandamus at this time. This very point was decided by the Supreme Court of the United States in issuing a writ of mandamus in

Gaines v. Caldwell, 148 U. S. 228, 13 S. Ct. 611, 617.

"In the present case, as we have before observed, there was no discretion to be exercised by the circuit

court; and although it might have been admissible to raise the question by a new appeal to the proper court, yet, in view of the delay to be caused thereby, we do not consider that such remedy would have been, or would be, fully adequate, or that a writ of mandamus is now improper."

III. HAS THE SUPREME COURT OF TEXAS VIOLATED THE MANDATE OF THE SUPREME COURT OF THE UNITED STATES?

Apart from the jurisdiction question, the only issue remaining as petitioner stated in his petition for mandamus on page 10 is:

> "Whether The Supreme Court of Texas has violated the mandate of the Supreme Court of the United States in directing the Court of Civil Appeals of Texas to inquire into the sufficiency of the evidence to support the jury's conclusion that employer negligence played a part in producing petitioner's injury when the Court of Civil Appeals was informed by the mandate of the Supreme Court of the United States that 'We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury,' and the Supreme Court of the United States directed the Court of Civil Appeals to proceed 'in conformity with the judgment and decree of this Court above stated * * *'."

How does respondent meet this issue? It has no reply thereto. So it resorts to evasion, confusion and the tactics of attributing to petitioner positions that petitioner does not take at all.

1. Respondent says The Supreme Court of Texas did not do at all what petitioner charges it with doing in the above

issue. (Reply, p. 20.) What The Supreme Court of Texas has done is indefensible and petitioner does not blame respondent for running away from the issue. However, respondent cannot change what The Supreme Court of Texas has said and done. Here are the exact words of The Supreme Court of Texas:

> "Consistently with our decisions cited in footnote 4, supra, we might ourselves now remand the case to the trial court for a new trial, but considering the peculiar circumstances of this case, and in the hope of making somewhat clearer the basic issue decided, we shall remand the case to the Court of Civil Appeals with directions to the latter to adjudicate, upon its own independent evaluation of the evidence and wholly apart from the judgment of the Supreme Court of the United States, whether or not the jury finding of negligence of the defendant in failing to furnish proper tools is so against the weight and preponderance of the evidence as to require a new trial in the interest of justice, and upon the basis of its said adjudication, to either affirm the judgment of the trial court or grant a new trial." (Opinion of Court as copied in Appendix of Petition for Writ of Mandamus, pp. 38-39.)

In the above issue, petitioner has correctly represented what The Supreme Court of Texas has done.

2. On page 18 of its Reply respondent resorts to its confusion argument. Respondent says that Deen contends that Mandamus will lie because this is an FELA case and there is an automatic exception in his favor to all provisions of the Constitution, the statutes, rules of court, and decisions and that Deen construes the comments of Justices Jackson, Roberts and Frankfurter in dissenting opinions,

as well as others, as evidencing an intention by the majority of the Supreme Court of creating a preferred class of litigants. Deen has made none of these contentions. But if he had, it would not justify The Supreme Court of Texas' violating the mandate of the Supreme Court of the United States. If the railway company wishes to make any charges against the Supreme Court of the United States or wishes to emphasize opinions expressed in some dissenting opinions, why does it not do so straight and direct rather than trying to force Deen to present its views?

3. Beginning on page 21 of its Reply and continuing to page 37 respondent says that The Supreme Court of Texas did not violate the mandate of the Supreme Court of the United States by directing the Court of Civil Appeals to inquire into the sufficiency of the evidence to support the jury verdict because the Supreme Court of the United States only decided that there was some evidence to support the jury verdict and this left open for determination by the state courts the question whether the verdict of the jury was against the overwhelming weight and preponderance of the evidence. Respondent argues at great length and cites many authorities on the points, that questions not passed on by the Supreme Court of the United States on certiorari are left open on remand for the determination of the state courts, that only questions expressly or by necessary implication passed on by the Supreme Court of the United States are encompassed within its mandate and that the Supreme Court of the United States does not pass on questions of fact. Deen does not contest any of these state-

ments. They again illustrate the point, respondent has no answer to the issue before this court presented in the petition for mandamus and respondent must try to find issues on which it can take a stand. The Supreme Court of the United States said in its mandate:

> "We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing the petitioner's injury."

That means that Deen's proofs have met the test of a jury case under the Federal Employers Liability Act. That means the Supreme Court of the United States has judicially appraised Deen's evidence as supporting with reason the jury's conclusion that employer negligence played a part in producing Deen's injury. That means that judicial appraisal of the evidence has been finally determined. That means so far as the evidence is concerned, Deen has met the burden placed on him by FELA and the obligation of his employer to pay damages has arisen. *Rogers v. Missouri Pacific Railroad Co., 352 U. S. 500, 77 S. Ct. 443.* Irrespective of any words, respondent may use to describe the above holding of the Supreme Court of the United States its meaning is clear. There have been many attempts to circumvent the test of a jury case in FELA cases as established in numerous cases by the Supreme Court of the United States. It has even been attempted by seeking to make the very distinction that The Supreme Court of Texas and respondent are seeking to make in this case, that is, that the Supreme Court of the United States in FELA cases can only pass on questions of no evidence and

the sufficiency of the evidence is for the state courts. But the Supreme Court of the United States refused to make any such distinction in

Harsh v. Illinois Terminal R.R. Co., 348 U. S. 940, 75 S. Ct. 362, 99 L. Ed. 736.

The Court of Appeals of Illinois in the above case held the verdict of the jury was against the weight and preponderance of the evidence and reversed and remanded the cause for a new trial. The Supreme Court of the United States granted certiorari and reversed the case simply citing

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740.

What the Supreme Court decided is clear when the following words of the *Lavender* case are considered:

> "We hold, however, that there was sufficient evidence of negligence on the part of both the Frisco trustee, and the Illinois Central to justify the submission of the case to the jury and to require appellate courts to abide by the verdict rendered by the jury." *(66 S. Ct. 740 at 743.)*

4. Respondent's final position as stated on page 38, et seq. of the Reply appears to be that since under local practice generally the Court of Civil Appeals of Texas may reverse and remand a case for new trial because in its opinion the verdict of the jury is against the overwhelming weight and preponderance of the evidence that it still has the right irrespective of the fact that the Supreme Court of the United States tells it in its mandate:

> "We hold the proofs justified with reason the jury's conclusion that employer negligence played a part in producing petitioner's injury."

The Court of Civil Appeals of Texas correctly held to the contrary. The Supreme Court of Texas reversed the Court of Civil Appeals on this point alone. After a mandate has been issued by the Supreme Court of the United States, state courts cannot proceed just as they did before the mandate and as if nothing had been settled by the Supreme Court of the United States. After remand, a lower court does not even have the power to grant a new trial on newly discovered evidence on a point decided by the Supreme Court of the United States.

Ex Parte Dubuque & Pac. R. Co., 1 Wall. 69.

While respondent has cited numerous cases discussing distinctions between "no evidence," "sufficient evidence," etc. not one of these cases hold or even suggest that a state court can again inquire into the sufficiency of the evidence to support the jury's conclusion that employer negligence played a part in producing petitioner's injury after the Supreme Court of the United States has already decided this question.

The Supreme Court of the United States has numerous times said it will not permit federal employers under FELA to be deprived of substantive federal rights under the guise of local practice. Certainly the right of trial by jury given federal employers under FELA and the corollary question whether the evidence is sufficient to make a jury case involve substantive rights, present federal questions, and such rights are not to be denied by state courts under the

guise of local practice, even in the absence of any specific mandate from the Supreme Court of the United States.

Brady v. Southern R. Co. (1942), 320 U. S. 476, 64 S. Ct. 232;

Chicago M. & St. P. Ry. Co. v. Coogan (1926), 271 U. S. 472, 46 St. C. 564;

Lavender v. Kurn, 327 U. S. 645, 66 S. Ct. 740;

Harsh v. Illinois Terminal R. R. Co., 348 U. S. 940, 75 S. Ct. 362, 99 L. Ed. 736.

As The Supreme Court of Texas said in discussing the *Deen* case in

Port Terminal Railroad Association v. Ross (1956), 289 S. W. 2d 220, 226:

> "In an action under the Federal Employers Liability Act, the question of what constitutes negligence, and the sufficiency of the evidence to raise that question for the jury, is to be determined by the applicable federal decisions."

IV. FURTHER COMMENTS ON RESPONDENT'S REPLY

1. Respondent on page 3 of its Reply says it owes the costs in the Supreme Court of the United States and will pay them subject to any offsets it may hereafter have. Deen prefers that the Santa Fe pay its debt now and in accordance with the mandate of the Supreme Court of the United States.

2. On page 4 respondent says the questions at issue in the petition for mandamus are:

> a. Whether the fact that this is an FELA case creates an exception to the uniform rule that the Supreme Court of the United States will never issue a mandamus where petitioner has the right of review by certiorari or appeal;
>
> b. Whether the mandate of the United States Supreme Court should have been construed by the Texas courts as a mandate ordering the affirmance of the trial court's judgment, without the right to consider matters not disposed of by the United States Supreme Court.

Petitioner agrees with respondent the fact that this is an FELA case does not create any exception to the general rules applicable to the issuance of the writ of mandamus by this Court to a lower court, but does not agree that a writ of certiorari that may be issued some time in the future necessarily an adequate remedy.

Petitioner agrees with respondent that the mandate of the Supreme Court of the United States should not have been construed by the Texas courts as a mandate ordering the affirmance of the trial court's judgment, without the right to consider matters not disposed of by the United States Supreme Court, and was not so construed.

3. On pages 5 to 11 respondent discusses the question and cites authorities on the point whether the granting of a new trial on the ground that the jury's verdict is against the weight and preponderance of the evidence is a denial of the right of trial by jury. The issue between the parties on the petition for writ of mandamus is whether The Supreme

Court of Texas has violated the mandate of the Supreme Court of the United States in directing the Court of Civil Appeals, irrespective of that mandate, to inquire into the sufficiency of the evidence to support the jury's conclusion that employer negligence played a part in producing petitioner's injury when the Court of Civil Appeals was informed by the mandate of the Supreme Court of the United States:

> "We hold that the proofs justified with reason the jury's conclusion that employer negligence played a part in producing petitioner's injury."

4. Irrespective of what the Supreme Court of the United States may have said about the legal meaning of such expressions as "contrary to the evidence," "against the weight of the evidence" and "insufficient evidence" in construing an act of the Congress applicable to the District of Columbia in

> *Metropolitan R. R. Co. v. Moore*, 121 U. S. 558, 30 L. Ed. 1022, 7 S. Ct. 1334,

quoted at great length on pages 22-25 of respondent's Reply, The Supreme Court of Texas should not have violated the mandate of the Supreme Court of the United States by directing the Court of Civil Appeals to inquire into a question that the Supreme Court of the United States had already decided.

5. Deen is not using a petition for mandamus as a motion for rehearing as stated by respondent on page 28 of its Reply. Why should Deen want a rehearing since all ques-

tions have now been decided in his favor either by the Supreme Court of the United States or The Supreme Court of Texas? Deen has already indicated by filing a remittitur that he is willing to forego $5500.00 of the damages awarded him by the jury on substantial and uncontradicted evidence, and taken away from him by the Court of Civil Appeals of Texas and The Texas Supreme Court, rather than be subjected to any further proceedings in the Texas courts. He does not want any rehearing. However, Deen believes this Honorable Court, at the proper time, will uphold the jury verdict in his favor on damages as it has heretofore done on negligence and causation.

6. Respondent cites *Ex Parte Texas*, *315 U. S. 8, 86 L. Ed. 579, 62 S. Ct. 418 (Reply 34-37)* as deciding, contrary to Deen's contention, "the very point" presented by Deen in his petition for writ of mandamus. In *Ex Parte Texas* in its opinion the Supreme Court of the United States expressly says that it did not pass on the sufficiency of the evidence to support the jury verdict and that on remand this question was left open for the determination of the state courts. Mr. Justice Frankfurter, speaking for the Court, said:

> "Therefore, when the litigation goes back to the District Court, it will not be imprisoned within an adjudication to be attributed to this Court which this Court never made."

In the *Deen* case, petitioner is asking that the litigation be imprisoned within an adjudication which the Supreme Court of the United States did make.

7. Deen at no time has contended that if the case is remanded to the trial court that the trial court would be required to instruct a verdict in favor of the railroad company (Respondent's Reply, pp. 37-38). Deen said that under Texas practice, the trial court on a new trial would have to submit the case to the jury, even if respondent's construction of the mandate is correct, which petitioner denies. However, if the jury again found for Deen the trial court in compliance with the decisions of The Texas Supreme Court and the Court of Civil Appeals would have to set the verdict aside because of the insufficiency of the evidence, if Deen presented the same evidence again. In discussing this strange anomaly in Texas practice the Court of Civil Appeals of Texas at Beaumont in

Norvell Service Company v. Spell, et al., 288 S. W. 2d 133, 144,

says:

> "Under the rule of decision referred to, a trial court must submit an issue to the jury even though the Court of Civil Appeals would have to set aside the finding which was based on the evidence requiring the submission."

The Supreme Court of Texas refused writ of error in the above case on the ground that the Court of Civil Appeals had committed no reversible error. Stripped of all legal jargon, the above rule means that a party is entitled to a jury trial so long as the jury decides the case the way the Texas appellate courts wish or think the case should go.

Even though the Court of Civil Appeals at Beaumont felt constrained to follow the above rule, in doing so the Court said:

> "It is a peculiar rule."

8. In his petition for writ of mandamus Deen did not take the position nor state that under the FELA a party is given the option of filing suit either in the state court or the federal court. (Respondent's Reply, pp. 38-39.) If it will help respondent present his argument, Deen is willing to take such position at this time. Nor has Deen contended as charged on page 39 of Respondent's Reply that state rules of practice cannot be followed in FELA cases. Deen's position is that The Supreme Court of Texas cannot deprive him of the substantive right of trial by jury, given him by the Congress, under the guise of local practice, particularly when the application of the local practice rule violates the mandate of the Supreme Court of the United States. Repondent knows the correct rule with regard to local practice as evidenced by the following words on page 23 of its Reply to Deen's Petition for Certiorari:

> "This Court has never overruled Dickinson v. Stiles, although it has held that some particular rule of practice destroyed the rights of a plaintiff under the Federal Employers Liability Act, and hence was unenforceable."

One of these unenforceable rules of local practice that the Supreme Court of the United States will not permit to destroy the rights of a plaintiff under FELA is that which prescribes the kind or amount of evidence re-

quired to establish jury issues on negligence and causation.

Chicago M. & St. P. Ry. Co. v. Coogan (1926), 271 U. S. 472, 46 Sp. Ct. 564, 565;

***Brady** v. Southern R. Co. (1943), 320 U. S. 476, 64 S. Ct. 232.*

The Supreme Court of Texas, whose actions the respondent is defending, in discussing the *Deen* case in

Port Terminal Railroad Association v. Ross (1956), 289 S. W. 2d 220, 226

stated the rule in these words:

> "In an action under the Federal Employers Liability Act, the question of what constitutes negligence and the sufficiency of the evidence to raise that question for the jury, is to be determined by the applicable federal decisions."

9. On page 22 of his Petition for Writ of Certiorari, Deen made the following statement:

> "The Supreme Court of the United States is the final authority to interpret the effect of a jury verdict rendered in a Texas state court in a FELA case. [Arnold v. Panhandle and Santa Fe Railroad Co. (1957), 353 U. S. 360, 77 S. Ct. 840.]"

The above is all that Dean said about the *Arnold* case either in this petition for mandamus or in his petition for writ of certiorari. Deen respectfully asks the Court to compare what he actually said about the above case, as noted above, and what the Santa Fe says that he said, on pages 43 and 44 of Respondent's Reply. Again petitioner says that if respondent wishes to criticize the opinion

of the Court in that case or express its approval of the minority opinion, it should do so straight and direct rather than doing so indirectly under the guise of attacking positions, which Deen has not assumed.

10. Petitioner does not agree with respondent's statement on page 45 of the Reply that if Deen will just go on back to the trial court for a trial de novo that he can win but he cannot lose. Why should Deen be put to the vexation, delay and expense of a new trial when all questions have been decided in his favor either by the Supreme Court of the United States or by The Supreme Court of Texas. Deen has no desire to be a modern Don Quixote fighting the windmills of legal technicalities and injustices in the Texas courts the rest of his life.

WHEREFORE, petitioner prays as he has heretofore prayed and petitioner prays for general relief.

Respectfully submitted,

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August 27, 1958

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply has been mailed on the 28th day of August, 1958, to the Honorable J. E. Hickman, the Chief Justice, and Honorable W. St. John Garwood, Meade F. Griffin, Robert W. Calvert, Clyde E. Smith, Frank P. Culver, Jr., Ruel C. Walker, James R. Norvell and Joe R. Greenhill, the Associate Justices of The Supreme Court of Texas c/o The Supreme Court of Texas, Capitol Building, Austin, Texas; and also to Messrs. Wigley, McLeod, Mills and Shirley, Attorneys at Law, Union Station Building, Galveston, Texas; to Messrs. Woodruff and Holloway, Attorneys at Law, First National Bank Building, Brownwood, Texas; and to Messrs. Hudson, Keltner and Sarsgard, Attorneys at Law, 1313 Continental Life Building, Fort Worth 2, Texas, attorneys for Gulf, Colorado and Santa Fe Railway Company.

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